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### Constitutional Aspects of Present Criminal Abortion Law

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## CONSTITUTIONAL ASPECTS OF PRESENT CRIMINAL ABORTION LAW\*

### INTRODUCTION

Abortion law has long been a strange breed in the annals of American jurisprudence. A multitude of articles have been written attacking the glaring inadequacies of current abortion laws and the failure of legislatures to effectively deal with the problem.<sup>1</sup> Nevertheless, strong arguments have also been urged in favor of the existing laws.<sup>2</sup> The nature of this conflict was succinctly summarized by Chief Justice Weintraub of the New Jersey Supreme Court when he stated:

[W]hereas in most areas of criminal prohibition the fact of evil is evident to most people, here there is evil or none at all depending wholly upon a spiritual supposition, for while men agree it is wrong to take life, yet knowing nothing about the void before or after their earthly presence, they cannot agree upon the point at which a living thing should be thought to be human in its being.<sup>3</sup>

The number of American women who annually receive illegal abortions is staggering. The most frequently cited estimate indicates that between 1,000,000 and 1,500,000 illegal abortions are performed each year.<sup>4</sup> Dr. F. J. Taussig, a renowned expert in abortion law, remarked that there is "no other instance in history in which there has

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\*This paper was originally prepared in fulfillment of seminar requirements at the Valparaiso University School of Law. The author, Lawrence E. Allan, is presently a third-year law student.

1. While most states have submitted revisions of abortion law to state legislatures, only five states have actually enacted abortion reform: California, Colorado, North Carolina, Maryland and Georgia. See CAL. HEALTH & SAFETY CODE § 25951(c)(2) (West Supp. 1967); COLO. REV. STAT. ANN. ch.40, art. 2, § 50 (1967); N.C. GEN. STAT. § 44.45 (1967); MD. ANN. CODE art. 27, § 3 (1968); GA. CODE ANN. § 26-1101, 1102 (1968). All other states have expressly defeated abortion reform, as New Hampshire did in 1961, or tabled discussion until a more "convenient time." L. LADER, ABORTION 111-16 (1966).

2. See Byrne, *A Critical Look at Legalized Abortion*, 41 L.A.B. BULL. 320 (1966); Byrne, ABORTION IN PERSPECTIVE, 5 DUQUESNE L. REV. 125 (1966); Drinan, *The Inviolability of the Right To Be Born*, 17 W. RES. L. REV. 465 (1965); Quay, *Justifiable Abortion-Medical & Legal Foundations*, 49 GEO. L.J. 173 (1960); Quay, *Justifiable Abortion-Medical & Legal Foundations*, 49 GEO. L.J. 395 (1961); Reinhold, *Abortion Law Reform in New York: A Study of Religious, Moral, Medical and Legal Conflict*, 31 ALBANY L. REV. 290 (1967).

3. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689, 709 (1967).

4. L. LADER, *supra* note 1, at 2; Gold, *Observation on Abortion*, 13 WORLD MED. J. 76 (1966).

been such a frank and universal disregard for a criminal law."<sup>5</sup> Although defenders of present abortion laws argue that perjury and motor vehicle violations are also overlooked but are nevertheless indispensable, such an analogy does not seem valid since the "victim" of the abortion is the woman upon whom the abortion is performed; and at the same time she is the very person who desires the "crime" to be committed.<sup>6</sup>

This disrespect for the prevailing body of abortion law, it is submitted, indicates the need for a re-examination of the basis of such laws.<sup>7</sup> Since the enforcement of abortion law is inconsistent and the legislators have failed to take any positive action to resolve the problem,<sup>8</sup> it is suggested that a re-examination of the abortion dilemma should take place in the courts. The basis of such re-evaluation may indeed center upon unconstitutional aspects of the prevailing body of abortion law. It is the purpose of this note to explore these constitutional questions.

#### INCEPTION AND EVOLUTION OF ABORTION STATUTES

Authorities disagree as to whether abortion law had its inception in the common law or whether it originated in the various state statutes. Justice McNaughton, in *Rex v. Bourne*,<sup>9</sup> maintained that it had never been the position of English common law that a life could be taken.<sup>10</sup> Further, under common law, life did not begin until "quickening": when movement of the fetus could be felt.<sup>11</sup> "Abortion," however, refers to the expulsion or detachment of a *pre-viable* ovum.<sup>12</sup> Thus, it would seem that laws prohibiting abortion (as we presently know them) had their beginnings in state statutes.

The first American abortion law was enacted in Connecticut in 1821.<sup>13</sup> As noted above, these statutes were a departure from English common law. However, this departure was cushioned in 1828 when New

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5. TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED MEDICAL & SOCIAL ASPECTS 422 (1936).

6. Arguments can be made that the victim of abortion is the unborn fetus (foetus), but while all courts do not accept that interpretation, the courts of every state have indicated that abortion is at least a crime against the woman, Leavy & Kummer, *Criminal Abortion—Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 134 (1962); JOSEPH P. KENNEDY, JR. FOUNDATION, *THE TERRIBLE CHOICE: THE ABORTION DILEMMA* 62 (1968).

7. Reingold, *supra* note 2, at 291.

8. JOSEPH P. KENNEDY, JR. FOUNDATION, *supra* note 6, at 62.

9. 3 All. E.R. 615 (K.B.) (1938); 1 K.B. 687 (1938); 108 L.J.K.B. 471 (1938).

10. *Rex v. Bourne*, 1 K.B. 687, 690 (1938).

11. *Id.*; ZABRISKE, *OBSTETRICS FOR NURSES* 543 (18th ed. 1960); BLACK'S LAW DICTIONARY 1415 (4th ed. 1951).

12. TAUSSIG, *supra* note 5, at 21.

13. L. LADER, *supra* note 1, at 86 (Kentucky, after 1879; Connecticut, 1860; Illinois, 1867; Iowa, 1878; New Hampshire, 1848; Virginia, 1848; New Jersey, 1849; Arkansas, 1947; Mississippi, 1956; Rhode Island, 1896).

York became the first state to recognize what today is termed the therapeutic abortion.<sup>14</sup> A "therapeutic" abortion is a detachment or expulsion of the pre-viable ovum *in order to save a life*.<sup>15</sup> Ohio followed the example of New York in 1834,<sup>16</sup> and Indiana and Missouri did likewise in 1935.<sup>17</sup> This trend continued and currently every state recognizes some form of therapeutic abortion.<sup>18</sup>

Carving out an exception in abortion law by means of permitting therapeutic abortion does not, however, solve the basic problem. The whole problem of *illegal* abortion is not touched by this exception. Also, statutes allowing therapeutic abortion usually rely on the judgment of individual or collective members of the medical profession to determine if an abortion is necessary to save a life.<sup>19</sup> Unfortunately, medical, as well as legal authorities, do not agree upon what conditions warrant a therapeutic abortion.<sup>20</sup>

Five states have attempted to remedy the existing ills of their respective abortion laws since 1967: Colorado,<sup>21</sup> North Carolina,<sup>22</sup> California,<sup>23</sup> Maryland<sup>24</sup> and Georgia.<sup>25</sup> Each state has deviated only

14. L. LADER, *supra* note 1, at 87.

15. Application of Grand Jury of the County of Kings, 286 App. Div. 270, 272, 143 N.Y.S.2d 501, 504 (1955 (emphasis added))—

16. L. LADER, *supra* note 1, at 87.

17. *Id.*

18. See Quay, *supra* note 2, at 395-520 for survey of American statutes. Louisiana has a strange dichotomy. LA. REV. STAT. ANN. § 14.87 (1950) states that no abortions are permitted, while LA. REV. STAT. § 37.1285 (1964) affords individual doctors the discretion to abort patients.

19. See Quay, *supra* note 2, at 395-520.

20. Reasons for therapeutic abortion, as subdivided by Dr. Kenneth Niswander, have four categories: (1) *Medical Indications* which include but are not limited to cardiovascular disease, gastrointestinal disease, renal disease, neurological diseases, pulmonary disorders, diabetes melitus, and malignancy; (2) *Fetal Indications* which include but are not limited to rubella (German measles), radiation, genetic disorders, erythroblastosis fetalis (anemia frequently caused by an unfavorable RH factor), and harmful drugs such as thalidomide and folic acid; (3) *Psychiatric Indications* which include but are not limited to suicidal reaction and severe psychotic reaction; and (4) *Socio-economic Indications* which include but are not limited to childbirth, poverty, care of existing family, medical reasons, and psychiatric reasons. Niswander, *Medical Abortion Practices in the United States*, 17 W. RES. L. REV. 403, 407-14 (1965). A recent note appearing in the *Vanderbilt Law Review* subdivides the medical-legal indications in a slightly different fashion: physical indications include heart, kidney and tuberculosic disorders; psychiatric indications include suicidal tendencies, severe post-partum or antecedent mental illness, social significance, and emotional after-effects of abortion; eugenic indications include disease, drug, or physical injury likely to result in the birth of a deformed child; humanitarian indications include the unwanted child as the product of criminal or statutory rape. Note, *Abortion Legislation: The Need For Reform*, 20 VAND. L. REV. 1313, 1322-26 (1967).

21. COLO. REV. STAT. ANN. ch. 40, art. 2 § 50 (1967).

22. N.C. GEN. STAT. § 44.45 (1967).

23. CAL. HEALTH & SAFETY CODE § 25951(c) (2) (1967).

24. MD. ANN. CODE art. 27, § 3 (as amended July, 1968).

25. GA. CODE ANN. § 26-1101, 1102 (as amended July, 1968).

slightly from the path suggested by the American Law Institute whose Modern Penal Code permits:

[T]he legal termination of a pregnancy before the twelfth week of gestation on three grounds: (1) medical (including psychiatric conditions which might become severe if the pregnancy were allowed to continue full term); (2) eugenic (which would allow abortion if there were a likelihood that the child would be born with serious mental or physical defects); and (3) humanitarian (which would justify the termination of a pregnancy which resulted from rape, incest or other felonious intercourse).<sup>26</sup>

Thus, except for the five states mentioned above, abortion is allowed in only one instance—to save a life. Whether a constitutional right of the mother or the child is being violated is the question next considered.

#### CONSTITUTIONAL CONSIDERATIONS

##### *The Right to be Born*

Perhaps the most dominant issue in a discussion of abortion law is whether a non-viable fetus has a constitutional right to be born. Traditionally, the right to be born is not discussed in the light of constitutional principles but rather in terms of morally desirable ends. Further, most arguments which are morally, religiously or ethically oriented start and end with an unequivocal affirmative or negative position on the issue. Often both opponents and proponents of the reform cite identical cases as valid precedent for their respective views.<sup>27</sup>

Certain areas of general agreement, however, do exist concerning some rights of the unborn. One such right is inheritance.<sup>28</sup> Another is the right to compensation for tortious injury sustained at a prenatal stage of development.<sup>29</sup> Yet another is the "moral" right to be born.<sup>30</sup> The proponents of reform qualify this right, however, where birth of the fetus would be detrimental to itself, to its mother or the family into which it would be born.<sup>31</sup> It should be noted that the primary right is that of the fetus. The rights of other persons, *i.e.*, mother, father and physician, are determined by this right of the fetus.

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26. Huddleston, *The Law of Therapeutic Abortion: A Social Commentary on Proposed Reform*, 15 J. PUB. LAW 386, 396 (1966), citing MODERN PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

27. Byrne, *The Abortion Question: A Nonsectarian Approach*, 11 CATHOLIC LAW 316, 318 (1965).

28. ATKINSON, WILLS 75 (2d ed. 1953).

29. PROSSER, TORTS 354-57 (3d ed. 1964).

30. Drinan, *supra* note 2, at 469.

31. *Id.*

## Opponents of Reform

Compelling arguments have been advanced by those who support the status quo of abortion law. They maintain that the fetus has the right to recover for injuries at both the viable and pre-viable stages of pre-natal development.<sup>32</sup> Thus a fetus was found to have a right to life where a New Jersey court stayed the execution of a pregnant woman until after childbirth.<sup>33</sup> This position was subsequently fortified by another New Jersey case which compelled a Jehovah's Witness expectant mother to receive a blood transfusion to save the life of a fetus.<sup>34</sup>

Two recent decisions further support the position of the opponents to reform. In 1965 a Connecticut court found that life begins at conception<sup>35</sup> and an Ohio decision held that a viable fetus is a "person" under the Ohio Constitution.<sup>36</sup>

In relation to the child's right to be born, a parent's right to be free from emotional or financial burdens, according to the arguments of opponents to reform, seems clearly subordinate. Thus, a New Jersey court refused recovery to the parents of a defective child against a doctor and his hospital where the parents alleged that the mother had contracted rubella during pregnancy and that the doctor had failed to inform the parents of the consequent likelihood of bearing a defective child and thereby precluded any decision by the parents to abort. The court held that public policy prohibits such action.<sup>37</sup> Judge Proctor indicated that he felt the action was one for "wrongful life." Continuing, he said:

The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of a defective child in embryo can support a cause for action.<sup>38</sup>

The underlying rationale of the proponents of existing abortion law was succinctly expressed by Judge Porter when he stated:

Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of

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32. ATKINSON, *supra* note 28; Wood v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Marion Tramways Co. v. Leveille, 4 D.L.R. 337 (1933); Kelley v. Gregory, 282 App. Div. 542, 125 N.E.2d 696 (3d Dept. 1953).

33. State v. Cooper, 22 N.J.L. 52, 51 Am. Dec. 77 (1849).

34. Raleigh-Fitkin Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 337 U.S. 985 (1964).

35. Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1965).

36. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

37. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

38. 227 A.2d at 693.

their child to live is greater than and precludes their right not to endure emotional and financial injury.<sup>39</sup>

Another problem involved in reformation of existing abortion law, according to the opponents of reform, concerns due process in relation to the child's right to be born. One authority has expressed this argument against reform by stating :

We are dealing with three parties when a pregnancy occurs because of rape or incest—the victim, the offender, and the unborn child. The criminal offender cannot be punished without the essentials of due process of law; a speedy and just trial, an able defense. Yet legalizing abortion in these cases would permit the taking of life of the unborn child without some legal safeguards. The growing recognition of the rights of the unborn child in other areas dictates that this innocent party—a human being—be afforded the same consideration and protection of due process.<sup>40</sup>

The opponents of reform, then, base their arguments in relation to the right to be born on two considerations: 1) the child's right to be born supercedes any right on behalf of the parent to forego emotional or financial injury by having an abortion; and 2) to allow abortion for reasons other than to save a life would violate due process of law afforded the unborn child.

#### Proponents of Reform

The proponents of reform regard the *non-viable* fetus as having no constitutional right to be born and, not unlike their adversaries, support their position with precedent rather than sound reasoning. This position was adopted by the proponents of the current California Therapeutic Abortion Act<sup>41</sup> when they urged that the unborn child not be considered a "person" within the rubric of the due process or equal protection of the law sections of the Constitution securing these rights to all "persons."

This view is also supported by abortion laws which afford primary protection to the mother with only residual benefits accruing to the fetus. This is clearly demonstrated by observing that the death of the fetus is not essential to a conviction for criminal abortion;<sup>42</sup> that a woman upon whom an abortion is performed is considered neither a felon nor an

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39. *Id.*

40. Herbert, *Is Legalized Abortion the Solution to Criminal Abortion*, 37 COLO. L. REV. 283, 285 (1965).

41. CAL. HEALTH & SAFETY CODE § 25951(c)(2) (1967).

42. *Smith v. State*, 160 Ind. 464, 67 N.E. 100 (1903).

accomplice to the act;<sup>43</sup> and that the unborn child may be destroyed if it is necessary to save the life of the mother.<sup>44</sup> Leavy and Kummer, in their article,<sup>45</sup> support this view: "The design of the (abortion) statute was not to prevent the procuring of abortions so much as to guard the health and life of the mother against the consequences of such attempts."<sup>46</sup>

Leavy and Kummer would hold the life of the mother in greater esteem than the life of the unborn fetus since they view the mother as a full person.<sup>47</sup> This view is supported, at least indirectly, by statutes and decisions in various states holding that the abortee may frequently be immunized from vulnerability to prosecution when her testimony is required to convict the abortionist.<sup>48</sup> It has also been held that the abortee is not an accomplice but a victim;<sup>49</sup> that a miscarriage is not required for a criminal abortion conviction;<sup>50</sup> and that the supposed abortee need not even have been pregnant in order to support a criminal abortion conviction.<sup>51</sup>

The view of the proponents of reform is also supported by the laws of New York state which appear to treat a non-viable fetus as a far less important being than a living person. In New York, the killing of a living human being is murder,<sup>52</sup> a Class A felony,<sup>53</sup> while the killing of a fetus is manslaughter,<sup>54</sup> a Class E felony.<sup>55</sup>

A review of legal history indicates that the fetus has been considered an inferior entity with regard to standing as a human being;<sup>56</sup> no case

43. *Rex v. Bourne*, 1 K.B. 687 (1938).

44. *State v. Murphey*, 27 N.J.L. 112, 114 (1858).

45. See Leavy & Kummer, *supra* note 6.

46. *Id.* at 135-36.

47. *Id.*; MODEL PENAL CODE § 148, Comment (Tent. Draft No. 5, 1956).

48. Note, *The Law of Criminal Abortion: An Analysis of Proposed Reforms*, 32 IND. L.J. 193 (1957); *People v. Gallardo*, 41 Cal. App. 2d 57, 257 P.2d 29 (1953).

49. Reingold, *supra* note 2, at 297.

50. *People v. Gallardo*, 41 Cal. App. 2d 57, 257 P.2d 29 (1953); *People v. Wales*, 136 Cal. App. 2d 846, 289 P.2d 305 (1955); *State v. Siciliano*, 21 N.J. 249, 121 A.2d 490 (1956); *Schoenen v. Board of Medical Examiners*, 54 Cal. Rptr. 364 (Dist. Ct. App. 1966).

51. MODEL PENAL CODE § 158, Comment (Tent. Draft No. 5, 1956); 139 A.L.R. 993 (1942).

52. N.Y. PENAL LAW § 1050 (1967).

53. N.Y. PENAL LAW §§ 125.25, 125.30 (1967).

54. N.Y. PENAL LAW §§ 125.40, 125.45 (1967).

55. N.Y. PENAL LAW § 125.40 (1967).

56. Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb. For if a woman is quick with child, and with a potion or otherwise killith it in her womb, or if anyone beat her whereby the child dieth in her body, and she is delivered of a dead child, though this was not murder by the ancient law of homicide or manslaughter . . . an infant ventre sa mere, or in the mother's womb, is supposed to be born in law for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned



has yet extended the Fourteenth Amendment to secure rights for the unborn. Moral or ethical philosophy may regard the unborn as a human being; but that human being has not been considered a "person" within the contemplation of the Fourteenth Amendment.<sup>57</sup>

The above discussion has attempted to summarize the basic arguments of the reform advocates. Both their position and that of the opponents of reform are reasonably logical and appealing, but it would appear that the reformists have the better constitutional position. The view that the fetus has a "non-person" status is evidenced by the nature of the criminal penalties,<sup>58</sup> the absence of cases extending the rights of the Fourteenth Amendment to the unborn,<sup>59</sup> and the conclusion reached by the California investigation.<sup>60</sup>

While the *Marion* case,<sup>61</sup> which held that a fetus is a "person" within the meaning of the Ohio Constitution, presents formidable superficial resistance to this conclusion, that case was a civil suit for pre-natal injuries and therefore has little relevance to constitutional considerations.<sup>62</sup>

### *The Mother's Right to Self-Defense*

In order to adequately discuss whether a pregnant woman has an inalienable right to bodily integrity and self-defense against the aggression of an unwanted fetus, consideration must be given to pregnancies which jeopardize the life or health of the expectant mother and those which arise from rape.

If a woman suffers from a medical malady such that pregnancy, childbirth or post natal care of a child would jeopardize her health, abortion may be available to her. Certainly this is true when her life is at stake.<sup>63</sup>

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to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were actually born. And in this point the Civil law agrees with ours.

Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 581 (1965), citing 1 BLACKSTONE COMMENTARIES, 129-30 (4th ed. 1771).

57. Reingold, *supra* note 2, at 298.

58. N.Y. PENAL LAW §§ 125.25, 125.30, 125.40, 125.45, 1050 (1967).

59. Gordon, *supra* note 56.

60. PROS AND CONS OF THERAPEUTIC ABORTION ACT, SB 462 (excerpts from the hearings of the Assembly Interim Committee on Criminal Procedure, June 20, 1964, held in San Francisco on the Humane Abortion Act, AB 2310), *Arguments For*, at 9, noted in Leavy & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A.L. REV. 1 (1967).

61. *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

62. *Id.*

63. In *Rex v. Bourne*, 1 K.B. 687 (1938), Justice McNaughton's charge to the jury stated: "The unborn child in the womb must not be destroyed unless the destruction of the child is for the purpose of preserving the yet more precious life of the mother."

If a woman is the victim of a criminal rape, it would seem that the aggression to her bodily integrity is compounded. The medical and psychological problems become even more severe since two aggressors exist—the rapist and the unwanted fetus which is the product of the rape. As indicated previously,<sup>64</sup> several states now permit abortion in certain cases of forcible rape.<sup>65</sup> Yet, to show the need for abortion in regard to the mother's mental health may not be enough. If the unborn child is held to be a "person" within the protection of the Fourteenth Amendment, something more awesome than a statutory device such as these states employ will be necessary to counteract and ultimately supercede the constitutional consequences of such personage. Therefore, statutes such as the one included in the New York Criminal Code before its 1967 revision,<sup>66</sup> which would afford a woman abortion rights on the premise of self-defense could not stand. If the unborn child has a right to birth, the statutory consideration must succumb to the constitutional one.<sup>67</sup>

The prospective mother's right of self-defense may, however, be constitutionally supported in two ways—the courts may find that statutory provisions afford due process of law sufficient to justify the killing of the fetus to save the life of the mother; or the courts may interpret the Ninth Amendment as containing the right to self-defense on the basis of the phrase: "The enumeration in the Constitution of certain rights,

64. CAL. HEALTH & SAFETY CODE § 25951(c)(2) (West Supp. 1967); COLO. REV. STAT. ANN. ch. 40, art. 2, § 50 (1967); N.C. GEN. STAT. § 44.45 (1967); MD. ANN. CODE art. 27, § 3 (1968); GA. CODE ANN. 26-1102 (1968).

65. CAL. HEALTH & SAFETY CODE § 25951(c)(2) (West Supp. 1967); COLO. REV. STAT. ANN. ch. 40, art. 2, § 50 (1967); N.C. GEN. STAT. § 44.45 (1967); MD. ANN. CODE art. 27, § 3 (1968); GA. CODE ANN. § 26-1102 (1968).

The legislatures of Georgia and Maryland have passed liberalized abortion statutes; at this writing, both bills are awaiting gubernatorial action and both are expected to become law. The legislation is similar to laws previously enacted in Colorado, North Carolina, and California. Both the Georgia and Maryland laws would permit abortion to protect the mental or physical health of the mother, to prevent the birth of a defective infant and to terminate pregnancies resulting from rape. The Georgia law contains stringent requirements for eligibility: the woman must be a state resident and the abortion must be approved by three physicians and the medical staff of an accredited hospital. In Maryland, the only requirement is that the abortion be approved by a hospital board, making this law the most liberal in the nation. A California legislative study has shown that 254 abortions were performed during the first two months the state's new abortion law was in effect—most of them to save the health of the mother. Only four of them were performed on out-of-state residents though the law's opponents had warned that the state would become an "abortion mill."

Playboy Magazine, June, 1968, at 55

66. N.Y. PENAL LAW §§ 80, 81, 81-a, 82 (1944).

67. The Constitution of the United States provides that it "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

shall not be construed to deny or disparage others retained by the people."<sup>68</sup> If residual powers inhere in the people, it is of little consequence that the manner of approach is not clearly outlined. Whether one follows the Goldberg approach in linking the Ninth and Fourteenth Amendments,<sup>69</sup> or whether one accepts Justice Douglas' view of penumbra<sup>70</sup> surrounding the various constitutional articles, has no bearing upon the existence of the right. These views affect only the decision as to which article will apply. It is difficult to find a more basic premise for life than the defense of life itself. If any rights are retained by the people through the Ninth Amendment, then certainly self-defense must be such a right.

### *The Right of Marital Privacy*

With the advent of *Griswold v. Connecticut*<sup>71</sup> and the recent tendency of the Supreme Court to maintain a vigil as guardian of individual rights, the right of privacy has gained prominence in both civil and constitutional cases.<sup>72</sup> Therefore, it becomes relevant to determine whether there is a constitutional right of privacy emanating from the marriage relationship; and, if so, whether proscription of abortive conduct by the state constitutes a violation of that right of marital privacy.

The right of privacy is difficult to analyze because of the absence of known limits. Such a right does not appear explicitly in the Constitution, but was found to exist by implication by the court in *Griswold*.<sup>73</sup>

Dean Robert Drinan would set the limits of privacy broadly and without terse, definitive reins:

Every married couple possesses a moral and a legal right to privacy from any undue interference from the state. This right, emphasized by the United States Supreme Court in *Griswold v. Connecticut*, involving the Connecticut birth control statute, should be as broad and as conclusive as is consistent with the good of society. The right to have, or not to have, children and to determine the number of such children are matters into which the state by general agreement should not interfere.<sup>74</sup>

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68. U.S. CONST. amend. IX.

69. See *Griswold v. Connecticut*, 381 U.S. 479, 487-99 (1965).

70. *Id.* at 480-87.

71. 381 U.S. 479 (1965).

72. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 328, 221 N.E.2d 543, 545, 234 N.Y.S.2d 877, 879, *rev'd on other grounds*, 387 U.S. 374 (1967); *Katz v. United States*, 389 U.S. 347 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961).

73. 381 U.S. at 481; see also 17 W. RES. L. REV. 601, 602-03 (1965).  
601, 602-03 (1965).

74. Drinan, *supra* note 2, at 474.

But this is only to argue what the law should be. It does not seem to explain the method of arriving at this point within a constitutional framework.

### Background of the Ninth Amendment

The key to future determinations presently rests with the *Griswold* case, and to discuss *Griswold* some background material concerning the Ninth Amendment and privacy are required. The Ninth Amendment was for years treated as a meaningless appendage to the Constitution.<sup>75</sup> In 1833, the Supreme Court held that the protection of the first ten amendments could not be extended as a restraint upon the states.<sup>76</sup> A later case,<sup>77</sup> following the same reasoning, reached the same conclusion with specific reference to the Ninth Amendment. In *Loan Association v. Topeka*,<sup>78</sup> the Supreme Court appeared to recognize that the Ninth Amendment acknowledged certain rights, fundamental in a free society, that could not be infringed upon. In 1947, the court found that the Ninth Amendment protected the fundamental and inherent "right of a citizen to . . . further his own political views."<sup>79</sup> These cases set the stage for *Griswold's* interpretation of the Ninth Amendment.

The zones of privacy relevant to *Griswold* include freedom of association<sup>80</sup> and security in the sanctity of the home.<sup>81</sup> The function of the Ninth Amendment in terms of the right of privacy have been interpreted by Professor Sutelán thusly:

[I]t appears that the Ninth Amendment was meant to possess two primary functions. First it was to be a statement of intent; an intention that the enumeration of certain rights in the first eight amendments was not to be exhaustive but that those fundamental though unenumerated rights were nevertheless meant to be protected. Secondly, it was meant to be a statement of direction; directing the judiciary back to the "due process of law" clause of the Fifth Amendment and later toward the same clause in the Fourteenth Amendment and imploring them for a broad interpretation of that clause in the protection of

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75. Sutelán, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV. 101, 102-10 (1966).

76. *Id.* at 107, citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242, 250 (1833).

77. *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 468 (1833).

78. Sutelán, *supra* note 75, at 107, citing 87 U.S. (20 Wall.) 655 (1874).

79. Sutelán, *supra* note 75, at 110, citing *United Public Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947).

80. See *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415, 430-33 (1963), noted in 17 W. RES. L. REV. 601, 603 (1965).

81. *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Mapp v. Ohio*, 367 U.S. 643, (1961), noted in 17 W. RES. L. REV. 601, 603 (1965).

those fundamental, unenumerated rights inherent in all individuals in a free society.<sup>82</sup>

Sutelan expands upon this view of the function of the Ninth Amendment by analyzing the reasons for its insertion into the Bill of Rights and the purpose for which it was promulgated. He conceives the Ninth as a guidepost securing to all persons safeguards against governmental actions of an unreasonable and arbitrary nature.<sup>83</sup> Sutelan concludes that a strict interpretation of the Constitution which would implement only specifically included rights improperly ignores the Ninth Amendment and the broad scope of the protection intended by the framers in the due process clause.<sup>84</sup> Still, Sutelan does not regard the Ninth Amendment as being omnipotent:

However this is not to say that the Ninth Amendment contains an independent source of rights which should be applied against the states by virtue of the Fourteenth Amendment or that it should be applied in total against the federal government. It merely gives to the judiciary direction toward the provision designed for the protection of fundamental rights.<sup>85</sup>

Justice Black, in a lecture given at New York University<sup>86</sup> made a partial disclosure of his theory of "absolutes" in the Bill of Rights, and in so doing tendered a syllabus of his view of the function of the Ninth Amendment.

Number Nine attempts to make certain that the enumeration of some rights must not be construed to deny or disparage others retained by the people. The use of the words "the people" in both the Amendments (9th and 10th) strongly emphasizes the desire of the Framers to protect individual liberty.<sup>87</sup>

Justice Black prefaced this comment with an all important assertion: "I believe that by virtue of the Fourteenth Amendment, the first ten amendments are now applicable to the states. . . ."<sup>88</sup> From Black's dissent in *Griswold*<sup>89</sup> one may reasonably infer that he does not believe in the right of privacy as a fundamental right retained by the people;

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82. Sutelan, *supra* note 75, at 119-20.

83. *Id.*

84. *Id.*

85. *Id.*

86. Address by Mr. Justice Hugo L. Black, James Madison Lecture, February 17, 1960, in 35 N.Y.U.L. Rev. 865 (1960).

87. *Id.* at 871.

88. *Id.* at 866.

89. *Griswold v. Connecticut*, 381 U.S. 497, 507-20 (1965).

but if he had so believed, he might well have used the Ninth to strike down the Connecticut birth control law.

### *The Griswold Case*

A large measure of the complexity presented by *Griswold* is created by the use of the Ninth Amendment in relation to the concept of privacy. The case holds that the Constitution does protect essential freedoms of the individual and among those essential freedoms is a right of marital privacy.<sup>90</sup> The vehicles the court used to arrive at the case holding are not clearly defined. Justice Douglas used the penumbra theory, finding zones of privacy in the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>91</sup> But he went beyond consideration of the Bill of Rights or the Constitution itself. He concluded his opinion with a humanistic reference to the marital relationship:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior discussions.<sup>92</sup>

A concurring opinion written by Justice Goldberg, with whom Chief Justice Warren and Justice Brennan joined, is based upon the Ninth Amendment as it fortifies the Fifth and Fourteenth Amendments.<sup>93</sup>

Justice Harlan's concurring opinion is predicated upon his view that the Connecticut birth control enactment infringes upon the Due Process Clause of the Fourteenth Amendment and thereby violates the basic values "implicit in the concept of ordered liberty."<sup>94</sup> Harlan makes no mention of the Ninth Amendment or the right of privacy, yet it is difficult to envision what basic value was violated if not marital privacy.

Mr. Justice White concurred in the result, viewing Connecticut's aiding and abetting statute as being in violation of the Fourteenth Amendment by depriving married couples of "liberty" without due process of law.<sup>95</sup>

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90. *Id.* at 482.

91. *Id.* at 484-85.

92. *Id.* at 486.

93. *Id.* at 493.

94. *Id.* at 500.

95. *Id.* at 502. White indicates that such encroachment on personal liberty requires great justification by the state. *Id.* at 504.

Justice Black and Justice Stewart dissented, being unable to perceive a right of privacy in the Constitution.<sup>96</sup> They saw the problem as one in the legislative domain, inappropriate for interference by the Court.<sup>97</sup>

Thus, five members of the Court recognized a right of privacy, two refused to accept the right as constitutional doctrine and one member remained in "limbo."<sup>98</sup> Because of recent changes in Court membership any prognostication about the right of privacy in terms of abortion law would be highly speculative at best. It appears, however, that the right of privacy itself would survive the present Court for two reasons: first, the reasoning used in the Douglas and Goldberg opinions is logically appealing; secondly, the trend of the law, both civil and criminal, is toward securing a broader scope of rights to the individual.

The *Griswold* case has been the target of the preceding analysis for several reasons. Since the constitutionality of criminal abortion law is in issue and since no cases have been decided on the specific subject, the most analogous material compels scrutiny. Leavy and Kummer present a comparison of the Connecticut birth control statute and anti-abortion legislation showing:

- (1) both statutes are at war with currently accepted standards of medical practice;
- (2) both statutes invade the sacred realm of marital privacy by denying married couples the right to plan the future of their family;
- (3) both statutes force the birth of deformed children, or leave abstinence as the alternative;
- (4) both statutes are largely unenforced, nevertheless prosecution hangs like a cloud over the medical profession;
- (5) both statutes result in discrimination against people in lower income economic brackets;
- (6) both statutes are in conflict with one of the world's most critical problems today, the population explosion;
- (7) both statutes involve the imposition of a religious principle on the entire community by government sanction.<sup>99</sup>

Due to the many similarities between the laws regulating abortion and those regulating contraception, Chief Justice Weintraub of the New Jersey Supreme Court reduced these two fields to a common denominator in his dissenting opinion to the recent case of *Gleitman v. Cos-*

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96. *Id.* at 507, 527 (joint dissents).

97. *Id.*

98. See notes 90-97 *supra* and accompanying text.

99. Leavy & Kummer, *Abortion and the Population Crisis: Therapeutic Abortion and the Law; Some New Approaches*, 27 O.S.L.J. 647, 674 (1966).

grove.<sup>100</sup> The courts may well rely on *Griswold* in deciding abortion cases; and it seems clear that the *Griswold* arguments will be advanced with vigor by the advocates of reform.

If the courts follow *Griswold* and if they hold the majority and concurring opinions in esteem, it would appear that a right of privacy does emanate from the marriage relationship and thereby estops proscriptive action by the state without greater justification than a moral basis.<sup>101</sup>

### *Physician-Patient Privacy*

Closely analogous to the problem of marital privacy is the matter of physician-patient privacy. In *Griswold*, a physician was permitted to raise the issue of the constitutional rights of his patients.<sup>102</sup> In so doing, a possible foundation was laid for expansion of the right of privacy, i.e., does a constitutional right of privacy emanate from the physician-patient relationship? If so, does state proscription of abortive conduct or medical counsel regarding abortive conduct violate that right of physician-patient privacy?

The doctor's evidentiary privilege of nondisclosure is closely related to the right of marital privacy. The reasons for both are analogous—as in the marriage relationship, the patient must have complete confidence in the doctor to create a deeply rooted trust sufficient to encourage uninhibited communication.<sup>103</sup> This proposition was supported in a case<sup>104</sup> which involved a New York Sanitary Code provision

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100. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (This quotation appears in part in the text accompanying note 3 *supra* and is repeated due to its dual meaning.)

Contraception and abortion have this in common, that whereas in most areas of criminal prohibition the fact of evil is evident to most people, here there is evil or none at all depending wholly upon a spiritual supposition, for while men agree it is wrong to take life, yet knowing nothing about the void before or after their earthly presence, they cannot agree upon the point at which a living thing should be thought to be human in its being. We know there is "life" in the ovum and sperm before conception, but as to the morality of contraception, every argument starts from and returns to an ethical or religious assumption. Hence he who opposes and he who supports contraception is equally sure he serves the dignity of man. And so as to abortion, men cannot agree upon the stage at which an embryo or fetus has a claim to acquire life in human form strong enough to override a woman's right to her own bodily integrity. It is not surprising, therefore, that legislators were able to agree only upon such vagueness as "without just cause" and "without legal justification."

227 A.2d at 709.

101. See Drinan, *supra* note 2, at 475.

102. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

103. WIGMORE, EVIDENCE § 2380a. (McNaughton rev. ed. 1961).

104. Application of Grand Jury of the County of Kings, 286 App. Div. 270, 143 N.Y.S.2d 501 (1965).



which required immediate notification to the Department of Health by hospital officials in cases where abortion or miscarriage was either discovered or expected. The court found that these requirements annulled the operation of general statutory provisions against disclosure by a physician of information acquired while attending a person in a professional capacity.<sup>105</sup> The court also held that the hospital was not required to submit all records in abortion cases for grand jury inspection. The court stated:

The statutory prohibitions governing the relation of doctor and patient or attorney and client "express a long-standing public policy to encourage uninhibited communications between persons standing in a relation of trust," and in the court's effectuation of such policy, "the statutes are accorded a broad and liberal construction" and the privileged communications are zealously guarded.<sup>106</sup>

A New York court affirmed this view as recently as 1966, when an indictment for an artificial and criminally induced abortion was dismissed.<sup>107</sup> The court found that the New York Code of Criminal Procedure affords a privilege of nondisclosure of communications acquired in the course of examination and treatment.<sup>108</sup>

Nevertheless, there is great disparity between a rule of evidence and a constitutional right. Whether this rule may be elevated to the latter level is unknown. Yet, comparatively recent decisions have overlapped rules of evidence and constitutional rights when the rules are so fundamental to our jurisprudential function that they are considered to be the elementary essentials of due process.<sup>109</sup>

It would seem that in an abortion prosecution the liberty of both doctor and patient are at stake because of the criminal sanctions which may be invoked. Also at stake is the intangible property right of the doctor to pursue his profession. Perhaps most serious, however, may be the danger to the life of the patient who, denied an abortion, feels compelled to seek out a back-street abortionist. Thus, there may be a failure to meet the due process requirement if abortion laws are violative of physician-patient privacy rights.

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105. *Id.* at 503.

106. *Id.* citing *People v. Shapiro*, 308 N.Y. 453, 455, 126 N.E.2d 559, 561 (1955).

107. *People v. McAlpin*, 50 Misc. 2d 579, 270 N.Y.S.2d 899 (1966).

108. *Id.*

109. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rochin v. California*, 342 U.S. 165 (1952); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Katz v. United States*, 389 U.S. 635 (1967).

Assuming that the marital right of privacy sets a precedent for the physician-patient right, two arguments are forthcoming. First, physician-patient privacy, in relation to its constitutional treatment, is part-and-parcel of the marital right, in which the husband and wife exchange knowledge or matter sacred to them, but in the presence of a confidential advisor. Considering the nature of the discussion, the matter is not made less sacred by the presence of this third party; and since the state has recognized the integrity of the advisor by licensing him as a professional, the private aspect of the matter is not jeopardized. Second, the proposition may be advanced that physician-patient communications are entitled to privacy in their own right for the same reasons as privacy is accorded the marital right.<sup>110</sup> Since the purpose behind the right is to avoid "intrusion upon the plaintiff's seclusion or solitude or into his private affairs . . .,"<sup>111</sup> compelling the physician to testify would effect a contrary result, and thereby irreparably impair the rights of the patient and perhaps those of the doctor as well.

This position, however, is subject to severe criticism. It has not been established that marital privacy embodies the right to abort. There is no evidence of cases holding to the effect that physician-patient privacy, where it exists, is part-and-parcel of any marital right. Furthermore, it is wise to distinguish between privilege and right; the former being capable of revision or even revocation, the latter being capable of resisting even the most vehement attack. Finally, marital privacy cannot be used as valid precedent since the marriage relationship is entirely different from, and far more intimate than, the physician-patient relationship.

The decision on this issue should depend upon the procreative effects of *Griswold*. It is certain that the state courts of the United States will not recognize a right emanating from a privilege which they do not recognize. But it is also true that the Supreme Court has the power to make a decision which will be binding upon those same state courts.<sup>112</sup> Thus, it is submitted, if the "victim of violence" patient (gunshot wound, knife wound, etc.) can be distinguished from the woman desiring an abortion for any reason whatsoever,<sup>113</sup> the physician-patient privacy

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110. See notes 102-08 *supra* and accompanying text.

111. EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 901-03 (1967).

112. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rochin v. California*, 342 U.S. 165 (1952); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Katz v. United States*, 88 S. Ct. 507 (1967).

113. Such a distinction is necessary to preserve the medical profession's invaluable contribution to the enforcement of criminal law, *i.e.*, reporting treatment for gunshot wounds, sharp instrument wounds, narcotic addiction treatment. Reporting these types

argument should have success.

*Proscription v. Administration and Receipt of Best Care*

In the past, courts have not only recognized the doctor's right to practice his profession, but have also required him to exercise his skill in accordance with the principles established by the medical profession for the betterment of his patient.<sup>114</sup> Yet, state proscription of abortive conduct or medical counsel regarding abortive conduct would seem to interfere with the doctor's exercise of this right and duty. The American Civil Liberties Union and the Association for the Study of Abortion regard the doctor's choice to abort as a civil right.<sup>115</sup>

They [abortion laws] impair the right of physicians to practice in accordance with their professional obligation in that they require doctors not to perform a necessary medical procedure because the statutory prohibitions on abortion would amount to malpractice in the absence of those prohibitions.<sup>116</sup>

The case law that is concerned with the doctor's right to practice medicine to the best of his ability offers no uniform guideline.<sup>117</sup>

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of treatment has not been successfully attacked on constitutional grounds, the rationale being that the public welfare is far more critical than the deprivation of a personal right or the Hippocratic Oath. See 1 DAVIS, ADMINISTRATIVE LAW §§ 2.04, 2.15 (1959); *Hawker v. New York*, 170 U.S. 189 (1898).

114. See *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936).

115. Association for the Study of Abortion, Newsletter, Vol. III, No. 2, at 3 (Summer 1968).

116. *Id.*

117. The conflict between the cases is presented by a comparison between *Walden v. Jones*, 289 Ky. 395, 158 S.W.2d 609 (1942) and *United States v. Freund*, 290 F. 411 (D. Mont. 1923), which favor greater discretion for doctors and *The Slaughterhouse Cases*, 6 U.S. (Wall.) 36 (1873) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963) which appear to oppose discretion in the professions. *One Package* presented a libel filed by the United States against a package of 120 vaginal pessaries allegedly imported contrary to the Tariff Act of 1930. From a decree dismissing the libel, the United States appealed. The court of appeals affirmed the dismissal. The claimant, Dr. Stone, a New York gynecologist, ordered the pessaries for her practice. The court found that the purpose of the statute was not to prevent the sale, importation or carriage by mail of things which can intelligently be used by conscientious physicians to save life or promote the well-being of patients. 86 F.2d at 739. *Walden v. Jones* was a civil action brought by a one-year-old child for the alleged negligence of a physician in failing to place silver nitrate in his eyes at birth. From a \$5,000 judgment for the child, the defendant doctor appealed. The dictum in the case indicated that the standard of knowledge, skill and required care which physicians must possess and exercise is such reasonable and ordinary knowledge, skill and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like circumstances. In *United States v. Freund*, provisions of the National Prohibition Act limiting the right of a physician to prescribe only one-half pint of alcohol within any ten day period is invalid as depriving physicians and patients of their liberty without due process of law within the Fifth Amendment of the Constitution. The court said:

It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with

However, the issue may again be raised in the California case of *Shively v. Stewart*,<sup>118</sup> in which the California State Board of Medical Examiners has charged nine prominent San Francisco doctors with unprofessional conduct for inducing illegal abortions.<sup>119</sup> The California Supreme Court remanded the case for discovery purposes and has not yet determined the issue.<sup>120</sup> The restrictions on medical care should be considered if *Shively v. Stewart*<sup>121</sup> is revived. Excerpts of the amicae curiae brief clearly indicate the need for decision.<sup>122</sup>

Another factor to be considered is that medical science has so advanced that an abortion can now be performed which is virtually free of danger to the pregnant woman.<sup>123</sup> Denying abortion for fetal deformity may impose arbitrary and unreasonable classifications which may deny the parents the advantages of currently accepted medical judgment.<sup>124</sup> While prevailing case law should not be solely determinative of the issue, when coupled with persuasive views on the basic inclusions of the Ninth Amendment, the result could well be an argument which is both logical and appealing.<sup>125</sup>

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which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment and upon the right of the patient to receive the benefit of the judgment of the physician of his choice. . . . The physician, with power to begin a course of treatment, must have like power to finish it. His judgment to begin must be unrestricted to conduct and finish.

290 F. at 414. The court found the provision in question to be an arbitrary and unreasonable interference with the lawful property and personal right of the physicians to prescribe alcohol for remedial purposes, and for ailing persons to receive it.

*The Slaughterhouse Cases* stand for the proposition that the State has the right to regulate an economic calling (in that case a butcher business). In *Ferguson v. Skrupa*, the Supreme Court found no fault with the state regulation of debt adjusting. Justice Black, writing the majority opinion said, "It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." 372 U.S. at 730-31.

Several distinctions should be mentioned. There is a material difference between a purely economic business and the practice of medicine. When *Slaughterhouse* was decided, the Fourteenth Amendment was but an infant. No doubt the state can and should control the medical profession to a degree but should that control extend to the internal operations of medical practice to touch upon both diagnosis and treatment as well as objective standards of proficiency to merit licensing?

118. 55 Cal. Rptr. 217, 421 P.2d 65 (1967).

119. *Id.*

120. *Id.* at 221.

121. *Id.*

122. Leavy & Charles, *supra* note 60, at 26.

123. L. LADER, *supra* note 1, at 17-23.

124. Leavy & Charles, *supra* note 60, at 25. See also *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936); *United States v. Freund*, 290 F. 411, 413 (D. Mont. 1923); *Walden v. Jones*, 289 Ky. 395, 158 S.W.2d 609 (1942).

125. The denial of the right to best medical care is very similar to the problem posed by denying women the choice for which their bodies are to be used. Does the

## CONCLUSION

The purpose of this paper has been to expose the dominant constitutional issues which are most likely to arise as an incident to any given criminal abortion statute. However, even a complete analysis of these issues has only limited value.<sup>126</sup> A case must be heard by the Supreme Court of the United States before the merit of the issues presented can be evaluated properly. It is submitted that the foregoing questions are those most likely to arise in the near future and most likely to be determinative in the courts' consideration.<sup>127</sup> It is also submitted that the collective body of American therapeutic abortion law may be unconstitutional. This position is taken because of the non-person status of the fetus, the recent progression of the right of privacy as a truly basic freedom and the absence of certainty with which therapeutic abortion law is drafted, administered and *unenforced*.

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state thus compel procreation without due process of law? See notes 15 and 104 *supra* and accompanying text.

126. Other issues may arise under any given abortion statute. Do criminal abortion laws deny equal protection of the Fourteenth Amendment to the lower strata socio-economic groups? JOSEPH P. KENNEDY, JR. FOUNDATION, *supra* note 6, at 96. Do criminal abortion laws violate the First Amendment clause which guarantees a separation between church and state by prohibiting the establishment of religion JOSEPH P. KENNEDY, JR. FOUNDATION, *supra* note 6, at 96. Do those criminal abortion statutes, such as the California Abortion Act, which provide for final determination on the permissibility of abortion by an administrative body, deny due process of law under the Fourteenth Amendment? Cf. Calif. Senate Bill No. 462, Chapter 11, at 25952-53. Do the residence requirements of abortion laws violate equal protection of the Fourteenth Amendment? See generally *Edwards v. California*, 314 U.S. 160 (1941); *Harrell v. Board of Commissioners*, 269 F. Supp. 919 (D.D.C. 1967); *Thompson v. Shapiro*, 270 F. Supp. 331 (D. Conn. 1967); *Smith v. Reynolds*, 277 F. Supp. 65 (E.D. Pa. 1967); *Green v. Dept. of Welfare*, 270 F. Supp. 173 (D. Del. 1967). Is the wording of such phrases as "unlawful" and "without lawful justification" so vague and indefinite as to deny due process of law under the Fourteenth Amendment to convicted physicians? See Association for the Study of Abortion, Newsletter, Vol. III, No. 2, at 3 (1968).

127. Holmes, *Law in Science and Science in Law*, COLLECTED PAPERS 238-39 (1920), *Foreward* to E. ROSTOW, *THE SOVEREIGN PREROGATIVE, THE SUPREME COURT AND THE QUEST FOR LAW* (1962).